

CLEAN WATER ACT HAZARDOUS SUBSTANCES WORST CASE DISCHARGE PLANNING REGULATIONS

ISSUE SUMMARY: On March 21, 2019, EPA was sued in the United States District Court for the Southern District of New York by three non-governmental organizations (NGOs) alleging violations of the Clean Water Act (CWA) section 311(j)(5)(A)(i) and the Administrative Procedures Act (APA) for failing to promulgate regulations for the worst-case discharge of CWA hazardous substances. On March 12, 2020, the plaintiffs and EPA entered into a [consent decree](#) stating that by March 12, 2022, EPA will sign a notice of proposed rulemaking, and 30 months after publication of the proposed rule, EPA will sign a notice taking final action following a notice and public comment on the rulemaking. The Office of Land and Emergency Management (OLEM) initiated the rulemaking process shortly after the date of the consent decree.

UPCOMING MILESTONES:

- **Spring 2021** – Options Selection for Proposed Rulemaking
- **Summer 2021** – Workgroup Closure for Proposed Rulemaking
- **March 2022** – Administrator Signature on Notice of Proposed Rulemaking (consent decree deadline)

BACKGROUND:

CWA section 311(j)(5) pertains to any “onshore facility that, because of its location, could reasonably be expected to cause substantial harm to the environment by discharging into or on the navigable waters, adjoining shorelines, or the exclusive economic zone.” CWA section 311(j)(5) provides the authority to issue “regulations which require an owner or operator of a . . . facility . . . to prepare and submit to the President a plan for responding, to the maximum extent practicable, to a worst case discharge, and to a substantial threat of such a discharge, of oil or a hazardous substance.” The statute contains specific provisions on the contents of the response plans, which must include the actions to respond to a worst-case discharge, as well as information on equipment, equipment testing, personnel training, and the qualified individual with authority to implement removal actions. Finally, all plans must be consistent with the National Contingency Plan (NCP) and the Area Contingency Plan (ACP).

Under Executive Order (EO) 12777, EPA was delegated the authority to regulate non-transportation-related onshore facilities under the CWA 311(j), which means EPA is required to review and approve response plans from those facilities. Additionally, under CWA 311(j)(6), EPA may conduct inspections on equipment used to remove discharges, and, under CWA 311(j)(7), EPA shall conduct unannounced drills of removal capability in areas for which ACPs are required and under relevant facility response plans.

EPA codified implementing regulations for CWA 311(j)(5) for the oil program in 1994: Facility Response Plans under Subpart D of 40 CFR 112. However, EPA has never proposed worst-case discharge planning regulations for CWA hazardous substances under 311(j)(5). On March 21, 2019, EPA was sued by NGOs alleging violations of CWA section 311(j)(5)(A)(i) and APA for failing to promulgate regulations for the worst-case discharge of CWA hazardous substances.

OLEM has established a workgroup for this proposed rulemaking and is working through the action development process. The workgroup is currently identifying key issues for Early Guidance, such as determining the size of the potentially regulated community, planning thresholds for the 296 CWA-designated hazardous substances, and planning

distance to water; identifying regulatory gaps and redundancies with EPA programs that include any of the 296 substances; and evaluating spill history data to define the scope of the problem.

KEY EXTERNAL STAKEHOLDERS:

☐ Congress ☒ Industry ☒ States ☐ Tribes ☒ Media ☒ Other Federal Agency
☒ NGO ☒ Local Government ☐ Other: _____

Industry is likely to be affected by any new worst-case discharge planning regulations.

States and local governments could also be affected through their emergency planning and response coordination activities. Specifically, State Emergency Response Commissions (SERCs) and Local Emergency Planning Committees (LEPCs) develop and review emergency response plans under the Emergency Planning and Community Right-to-Know Act (EPCRA), which should be coordinated with the facility response planning for worst case discharges of CWA hazardous substances.

The Department of Transportation (DOT) and U.S. Coast Guard (USCG) could be directly impacted by any new regulations, since they have ownership of CWA 311(j)(5) for transportation-related facilities and offshore facilities, per EO 12777. Any regulations that EPA promulgates could set the path for parallel regulations by DOT and USCG.

EPA was sued to implement CWA 311(j)(5) for hazardous substances by three NGOs: Environmental Justice Health Alliance for Chemical Policy Reform, Clean Water Action, and Natural Resources Defense Council, Inc.

MOVING FORWARD:

OLEM's Office of Emergency Management has the lead for this rulemaking. The workgroup, consisting of OP, OGC, ORD, OW, OECA, R2, R4, R6, R8, and R9, has been established. Early Guidance is projected to occur in October 2020, with Options Selection in Spring 2021 and Workgroup Closure in Summer 2021. OMB review is expected on this action.

The workgroup is assessing current regulatory approaches to response planning for a worst-case discharge or substantial threat of a discharge of the 296 designated CWA hazardous substances. EPA will identify regulatory gaps and develop a regulatory approach to meet the requirements of CWA 311(j)(5)(A), including examining the costs and benefits.

LEAD OFFICE/REGION: OLEM

OTHER KEY OFFICES/REGIONS (WORKGROUP MEMBERS): OP, OGC, OECA, ORD, OW, R2, R4, R6, R8, AND R9